

Report from Brussels

AnwaltsPraxis

Direct effect of directives - not between private individuals

The ECJ maintains that directives can only confer rights directly on individuals but cannot create obligations.

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Already in 1974 the European Court of Justice (ECJ) ruled that directives can have direct effect even if they have not been transposed or have not been transposed correctly. The principle has only applied in case of the so-called vertical relationship, i.e. in the relationship between private individuals and the state. Over the years, however, the ECJ has made some exceptions to this. Now, on 18 January 2022, in case C-261/20, the ECJ, upon referral by the German Federal Court of Justice (BGH), once again had to answer the question whether directives also apply directly between private parties (so-called horizontal effect of directives).

The original case is about billing according to the Fee Structure for Architects and Engineers (HOAI). The ECJ had already declared the binding maximum and minimum rates to be unlawful under EU law in July 2019 because they violated the applicable Services Directive (Directive 2006/123/EC). Now, however, the BGH was faced with the question of what consequences this decision could have for a legal dispute between private parties. The BGH had already excluded the possibility of interpreting § 7 HOAI in the sense of Union law or the Directive (interpretation in conformity with the Directive). In concrete terms, the question referred therefore concerned the court's obligation to leave the paragraph unapplied. The ECJ has now created legal certainty and clarified that a direct effect of directives between private parties is still not to be assumed as a basic principle.

Advocate General Szpunar, on the other hand, attempted in his closing proposal to derive by way of argument a direct effect of the directive. The directive concretised the directly applicable freedom of establishment, Article 49 TFEU. This direct effect must therefore also be transferred to the present case. In any case, however, the national court must carry out a review of legality based on the freedom of contract under Article 16 of the Charter of Fundamental Rights. Both possibilities would lead to the national legal norm contrary to EU law not being allowed to be applied.

The ECJ did not follow this proposal. It remained true to its previous jurisdiction implying that directives cannot have direct effect between private parties.

It is an essential feature of European law that directives do not create obligations for individuals. According to Article 288 (3) TFEU, only the Member States are addressed by directives. It is not until the Member States have transposed the requirements of the directive into national law that obligations arise for private individuals. The case law on the direct effect of directives could not be applied to a horizontal dispute. Even if the individual is entitled to rights directly derived from the directive, it always corresponds to a horizontal obligation of the other party. The private individual could, however, be entitled to compensation against the member state if the latter had transposed a directive incorrectly.

The ECJ, in its decision on the Temporary Agency Workers Directive (Case [C 232/20](#)), which was published on 17 March 2022, expressly referred to its case law in the HOAI judgment. The discussion on the horizontal application of directives should thus be over for the time being.

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